

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA)	CRIMINAL NO. 3:19-cr-00108
)	
vs.)	
)	SENTENCING
JOHN HARDEE)	MEMORANDUM

The United States submits this sentencing memorandum in support of the Presentence Investigation Report (PSR). Further, the government does not object to a probationary sentence. Defendant Hardee has a total offense level of 12 and a guideline imprisonment range of 10-16 months. For the reasons articulated below, the government acknowledges that it cannot prove beyond a reasonable doubt, or by a preponderance of the evidence, that Hardee performed “an official act” in exchange for a bribe or kickback, nor can the government prove that Hardee ever intended to perform an official act in exchange for a bribe or kickback. Therefore, it is the position of the government that a probationary sentence would be sufficient, but not greater than necessary to achieve the goals of sentencing.

As detailed more thoroughly in the PSR, Cooperating Witness 1 (CW1) provided information that he had provided bribes and kickbacks to public officials in exchange for the award of government infrastructure contracts. CW1 claimed he had paid money to Hardee, then a member of the SC Department of Transportation

(DOT) Board of Commissioners, in exchange for contract awards. Although CW1 produced records of multiple payments made to Hardee during his tenure as a DOT Commissioner, CW1 was unable to identify any project that he had been awarded based upon his payments to Hardee. CW1 agreed to assist the FBI in their investigation of Hardee. CW1 then made monitored and recorded telephone calls to Hardee, warning him of a potential FBI investigation into the payments.

Initially, Hardee instructed CW1 to claim that the payments to him were for an unrecorded loan. Then Hardee changed his mind and told CW1 to claim that the payments were for previous work Hardee performed for CW1's business. Hardee and CW1 had multiple recorded conversations about the payments and how best to explain them to the FBI. Eventually, Hardee agreed to meet CW1 in the parking lot of a local restaurant to discuss the payments. During the meeting, CW1 indicated that he was not sure he could convince the FBI of Hardee's story because of emails between CW1 and Hardee showing the payments were not for a loan or payment for old work. Hardee then instructed CW1 to destroy the emails before the FBI could find them. The meeting between Hardee and CW1 was captured on audio and video recording. Hardee's instructions to CW1 to destroy emails and correspondence between him and CW1 form the basis for the federal charges against Hardee.

Despite extensive investigation into DOT awards, the government is unable to find any contract awards to CW1 that were made as a result of CW1's payments

to Hardee. The government cannot prove that Hardee engaged in an “official act” as required by the federal bribery statute, nor is the government able to prove any intent to perform an official act by Hardee. As stated by the United States Supreme Court:

An “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy.” The “question, matter, cause, suit, proceeding or controversy” must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is “pending” or “may by law be brought” before a public official. To qualify as an “official act,” the public official must make a decision or take an action on that “question, matter, cause, suit, proceeding or controversy,” or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an “official act” or to advise another official, knowing or intending that such advice will form the basis for an “official act” by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of “official act.”

McDonnell v. U.S., 195 L.Ed. 2d 639, 136 S. Ct. 2355, 2372 (2016).

The government is unable to prove that Hardee was performing an “official act” because there was no contract award “specific and focused that [was] pending or [might have] by law be brought before a public official.” The government is unable to point to any specific decision or action on a “question, matter, cause, suit, proceeding or controversy” that Hardee acted upon because of payments from CW1.

In its determination that a probationary sentence is “sufficient, but not greater than necessary,” the government wishes to draw a distinction between individuals

like Hardee that have not performed an official act in exchange for payment and those that have actually betrayed the public trust by allowing a bribe or kickback to cause an official act. This case warrants prosecution if only to deter other individuals from attempting to interfere in federal investigations; however, the government would be remiss not to acknowledge that it cannot prove Hardee's underlying actions were illegal. As emphasized by the Supreme Court in *McDonnell*,

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

Id. at 2375.

Although Hardee's acceptance of payments that CW1 intended to be bribes is distasteful, the United States Supreme Court has found it to be lawful so long as there is no official action. The government cannot prove an official action, nor can the government prove that Hardee ever intended to perform an official action. Thus, Hardee's crime lies only in his decision to attempt to obstruct an investigation into those payments. As such, and in keeping with the government's desire to draw a distinction between individuals like Hardee and those that are guilty of accepting bribes and kickbacks, a probationary sentence would be sufficient, but not greater than necessary in this matter.

Respectfully submitted,

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